

# The Guardianship Process

## Establishing a Guardianship

Incapacity is defined in the Texas Estates Code. An “Incapacitated Person” is an adult who, because of a physical or mental condition, is substantially unable to:

1. Provide food, clothing or shelter for himself;
2. Care for the person’s own physical health;
3. Or manage the person’s own financial affairs.

If none of the alternatives to guardianship will provide the level of protection needed by the person with an incapacity, guardianship may be the necessary course of action to follow.

An attorney usually files the application for guardianship. Anyone can hire an attorney to assist with the guardianship process. In most cases, family or friends of the incapacitated person who are willing to step in and help the person in need are the ones to initiate the process. But it does not have to be. If the person that needs a guardian has been reported to Adult Protective Services because of neglect, abuse or exploitation, the Health and Human Services Guardianship Program could file to be guardian. A private professional guardian or a guardianship program can also file to become guardian if necessary but, in Texas, there are more family members serving as guardian than professional guardians. Based on statistics collected by the Judicial Branch Certification Commission (JBCC) which is a part of the Office of Court Administration in Texas, 90% of all guardians in Texas are family, friends or other non-professionals.

If there is a situation in which a person obviously needs a guardian but there is no one willing or suitable to step up and file to be guardian, any individual can make a referral to the court for a Court-Initiated Guardianship. This is also often used when there is family willing to be guardian but without financial means to pay for attorney and court fees. Chapter 1102 of the Texas Estates Code requires a court that receives notice that a person living in that particular county appears to need a guardian and does not have one, to investigate to determine if a guardianship is needed and who would be the best person to act as guardian.

The actual application for guardianship includes an introduction to the need for guardianship, basic demographic information, a statement to establish residency in that county and the relationship of the person filing for guardianship. The application must also identify other family members and/or interested parties and those parties must be served notice that the application has been filed. The Texas statutes are specific about what is to be included in the application. The full list of information required in an application for guardianship can be found in Section 1101.01 of the Texas Estates Code. (<http://www.statutes.legis.state.tx.us/Docs/ES/htm/ES.1101.htm#1101.001>)

A Certified Medical/Mental Examination that answers very specific questions about the reason for incapacity and how long it could be expected to last must also be completed and signed by a physician or psychiatrist. The medical report allows the doctor to state if a person still retains the ability to make some decisions, such as the ability to vote or to marry. If the proposed person with an incapacity has an intellectual disability, there is a section in the report that addresses the determination of incapacity “in accordance with the rules of the executive commissioner of the Health and Human Services Commission”. If the only disability is intellectual, the individual must have been examined by a physician or psychologist within the past 24 months from the date of the guardianship court hearing. If the disability is physical and mental, the Certified Medical/Mental Exam must be filed with the court within 120 days of the date the physician examined the proposed ward. The exams must be done again if they were not completed within these timeframes. If the Certified Medical Exam indicates that the person is not totally incapacitated, the application needs to indicate to the court specifically which rights should be retained and which rights should be vested in the guardian.

Once the application for guardianship and the Certified Medical Exam are filed with the appropriate Court, the legal processes to investigate and determine if a guardianship is appropriate begin.

After a guardianship application is filed the Court is required to appoint an Attorney Ad Litem to represent the proposed person with an incapacity and advocate for the person’s rights. The Attorney Ad Litem interviews the client to determine his or her wishes and evaluate the situation.

## Due Process

Texas law requires that notice of the proceeding must be provided to certain relatives and entities.

*There are a number of protections built into the guardianship statutes to ensure that a person really needs a guardian before any rights are removed.*

1. Notice of proceeding must be served.
2. Appointment of legal representation (Attorney Ad Litem)
3. Hearing and the right to a jury trial if wanted
4. Appearance at hearing unless not in the person’s best interest
5. Opportunity to compel and confront witnesses
6. Opportunity to present evidence
7. Clear and convincing standard of proof is required.
8. Ability to appeal the court’s determination

These protections are a critical part of the guardianship process and serve to protect adults from unnecessary guardianship.

### Guardianship Hearing

The guardianship hearing is a legal action in which all the evidence is presented and recorded for a permanent record. After all the evidence is presented, the judge hearing the case makes a decision.

*There are two burdens of proof that come into play in a guardianship hearing. Clear and convincing evidence is a medium level of burden of proof which is a more rigorous standard to meet than the preponderance of the evidence standard, but a less rigorous standard to meet than proving evidence beyond a reasonable doubt.*

## Clear and convincing evidence must establish:

1. Whether the person is incapacitated;
2. If it is in the best interest of that person to appoint a guardian;
3. If the person's rights/property will be protected by appointment of a guardian; and
4. Alternatives to guardianship/supports and services have been considered and are not adequate.

## Preponderance of evidence must establish that:

5. The Court has venue and is the proper court;
6. The proposed guardian is eligible and is not disqualified by statute;
7. Whether the incapacity is total or partial;
8. Incapacity is shown by recurring acts or happenings within the preceding 6 month period and NOT by isolated instances of bad judgment.

After hearing all the evidence, the judge will make a ruling on the guardianship application. The ruling will include whether the guardianship is full or partial depending on the nature and severity of the person's incapacity and will name the person or entity to act as guardian of the rights of the person with an incapacity. The Texas statutes are plain that a guardianship should not be cookie-cutter and should be tailored to meet the needs of each person needing a guardian. In some situations, only a Guardian of the Person is needed. In others, only a Guardian of the Estate is needed. It is also possible to have a Guardian of the Person that restricts only some of the individual's rights and allows the person to retain those rights that they can still manage.

## Qualification of the Guardian

Once appointed by the court, the guardian must sign an oath agreeing to fulfill the obligations of guardianship. A bond is also required. A bond is basically an insurance policy that will provide restitution to the incapacitated person if there is malfeasance on the part of the guardian. The amount of bond required is determined by the court. For guardianship of the estate, the amount of bond depends on the value of the estate. For guardianship of the person, it is the court's discretion to determine the amount of bond required.

When proof of bond and the guardianship oath are provided to the court, the clerk will issue the Letter of Guardianship. This document states the date the guardianship was approved and when it will expire. It also states if the guardianship is total or limited and names the person or entity that is guardian.

The Letter of Guardianship is the authority under which the guardian makes all decisions regarding medical treatment, living arrangements, and anything else regarding the person with a guardian. If there is a guardianship of the estate, the Letter of Guardianship gives the guardian legal authority to make any financial decisions required. A copy of the Letter of Guardianship must be provided to all medical providers and financial institutions before the guardian can act on behalf of the incapacitated person. Guardianship invalidates any prior financial Powers of Attorney executed prior to the guardianship.

If the guardianship approved by the court is a limited guardianship, the order appointing the guardian will specify exactly which rights are retained by the person and which rights are given to the guardian. In the case of a limited or partial guardianship, the order signed by the judge appointing a guardian should be attached to the Letters of Guardianship.

## Temporary Guardianship

The guardianship process can be lengthy with all the due process protections built into the Texas Estates Code. A temporary guardianship can be appropriate in certain circumstances. If there is an emergency situation in which a person's health, safety or finances are in immediate danger, a temporary guardianship application can be filed. The main distinction is that while the person is not presumed to be incapacitated, there is substantial evidence that the person may be incapacitated.

Some of the procedures in a temporary guardianship are the same as permanent guardianship. An attorney is appointed to represent the proposed person with an incapacity and the clerk of the court issues notice to the proposed person with an incapacity and the attorney appointed to represent that person. The notice must describe the rights of the parties involved and the date, time and place of a hearing on the temporary guardianship application. The hearing for a temporary guardianship application must be held not later than the 10th day after the application was filed. It can only be postponed for up to 30 days if the proposed person with an incapacity and the appointed attorney agree.

If the court determines that there is substantial evidence that the proposed person in need of guardianship is an incapacitated person and that there is imminent danger that the health or safety will be impaired or that the estate will be seriously damaged or dissipated without immediate action, the court may appoint a temporary guardian in an order that describes the reasons for the action and the powers and duties assigned to the temporary guardian.

The temporary guardian must sign an Oath and provide proof of a bond as set by the court. When these are filed with the clerk, a certificate is attached to the order appointing the temporary guardian. This order instead of Letter of Guardianship will be used as proof of the guardian's authority to act. A temporary guardianship is normally in effect for no more than 60 days.

### Individual Rights of a Person with a Guardian

A person under guardianship retains the rights, benefits, responsibilities, and privileges granted by the constitution and laws of this state and the United States, except where specifically limited by a court-ordered guardianship or where otherwise lawfully restricted. (Texas Estates Code §

1151.351) Pursuant to Section 1151.351 of the Texas Estates Code, a person under guardianship retains the following rights:

- (1) To have a copy of the guardianship order and letters of guardianship and contact information for the probate court that issued the order and letters;
- (2) To have a guardianship that encourages the development or maintenance of maximum self-reliance and independence in the ward with the eventual goal, if possible, of self-sufficiency;
- (3) To be treated with respect, consideration, and recognition of the ward's dignity and individuality;
- (4) To reside and receive support services in the most integrated setting, including home-based or other community-based settings, as required by Title II of the Americans with Disabilities Act;
- (5) To consideration of the ward's current and previously stated personal preferences, desires, medical and psychiatric treatment preferences, religious beliefs, living arrangements, and other preferences and opinions;
- (6) To financial self-determination for all public benefits after essential living expenses and health needs are met and to have access to a monthly personal allowance;
- (7) To receive timely and appropriate health care and medical treatment that does not violate the ward's rights granted by the constitution and laws of this state and the United States;
- (8) To exercise full control of all aspects of life not specifically granted by the court to the guardian;
- (9) To control the ward's personal environment based on the ward's preferences;
- (10) To complain or raise concerns regarding the guardian or guardianship to the court, including living arrangements, retaliation by the guardian, conflicts of interest between the guardian and service providers, or a violation of any rights under this section;
- (11) To receive notice in the ward's native language, or preferred mode of communication, and in a manner accessible to the ward, of a court proceeding to continue, modify, or terminate the guardianship and the opportunity to appear before the court to express the ward's preferences and concerns regarding whether the guardianship should be continued, modified, or terminated;
- (12) To have a court investigator, guardian ad litem, or attorney ad litem appointed by the court to investigate a complaint received by the court from the ward or any person about the guardianship;
- (13) To participate in social, religious, and recreational activities, training, employment, education, habilitation, and rehabilitation of the ward's choice in the most integrated setting;
- (14) To self-determination in the substantial maintenance, disposition, and management of real and personal property after essential living expenses and health needs are met, including the right to receive notice and object about the substantial maintenance, disposition, or management of clothing, furniture, vehicles, and other personal effects;
- (15) To personal privacy and confidentiality in personal matters, subject to state and federal law;

(16) To unimpeded, private, and uncensored communication and visitation with persons of the ward's choice, except that if the guardian determines that certain communication or visitation causes substantial harm to the ward:

(A) The guardian may limit, supervise, or restrict communication or visitation, but only to the extent necessary to protect the ward from substantial harm; and

(B) The ward may request a hearing to remove any restrictions on communication or visitation imposed by the guardian under Paragraph (A);

(17) To petition the court and retain counsel of the ward's choice who holds a certificate required by Subchapter E, Chapter 1054, to represent the ward's interest for capacity restoration, modification of the guardianship, the appointment of a different guardian, or for other appropriate relief under this subchapter, including a transition to a supported decision-making agreement, except as limited by Section 1054.006;

(18) To vote in a public election, marry, and retain a license to operate a motor vehicle, unless restricted by the court;

(19) To personal visits from the guardian or the guardian's designee at least once every three months, but more often, if necessary, unless the court orders otherwise;

(20) To be informed of the name, address, phone number, and purpose of Disability Rights Texas, an organization whose mission is to protect the rights of, and advocate for, persons with disabilities, and to communicate and meet with representatives of that organization;

(21) To be informed of the name, address, phone number, and purpose of an independent living center, an area agency on aging, an aging and disability resource center, and the local mental health and intellectual and developmental disability center, and to communicate and meet with representatives from these agencies and organizations;

(22) To be informed of the name, address, phone number, and purpose of the Judicial Branch Certification Commission and the procedure for filing a complaint against a certified guardian;

(23) To contact the Department of Family and Protective Services to report abuse, neglect, exploitation, or violation of personal rights without fear of punishment, interference, coercion, or retaliation; and

(24) To have the guardian, on appointment and on annual renewal of the guardianship, explain the rights delineated in this subsection in the ward's native language, or preferred mode of communication, and in a manner accessible to the ward.

A copy of these rights must to be provided to the person with a guardian along with a discussion of the rights when the guardianship is first approved and on each succeeding year that the guardianship is renewed.

## The Courts' Responsibility

The Court's responsibility does not end after a guardian is appointed for the person with an incapacity. The Court must also monitor that the need for guardianship continues to exist beyond the initial determination of need. Each year the Guardian of the Person is required to file an Annual Report that provides a status of the person with a guardian that includes a summary of medical history for the past year, an evaluation of the living arrangements and activity level plus any unmet needs. The guardian makes a recommendation to

the court if the guardianship is still appropriate or changes need to be made. Each year the Guardian of the Estate is required to file a detailed Annual Accounting which includes all the income and expenses paid out over the past year with copies of all bank statements and investment accounts.